Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

80-439

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

ROBERT MELLI,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RONALD P. FISCHETTI
Counsel for Petitioner
1290 Avenue of the Americas
New York, N.Y. 10104
(212) 586-3732

ANNE C. FEIGUS
Of Counsel

September 19, 1980

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TELEPHONE: (212) 447-5358

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ROBERT MELLI,

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QUESTION PRESENTED

Whether the omission of the requested "no inference" instruction from the court's charge constituted plain error, depriving petitioner of due process of law?

The petitioner Robert Melli respectfully prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals affirming the judgment of conviction entered against petitioner by the Supreme Court of New York County, New York.

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OPINIONS BELOW

The orders of the New York Court of Appeals, denying petitioner's applications for leave to appeal and recon-

sideration thereof, appear in the Appendix hereto at pages A 3 and A 4 . No written opinion was rendered by the intermediate appellate court, the New York State Supreme Court, Appellate Division, First Judicial Department. The order of that court appears in the appendix at page A 1 .

JURISDICTION

The judgment of the New York State Court of Appeals was entered on June 20th, 1980. A timely petition for reconsideration thereof was denied on July 25th, 1980. This Court's jurisdiction is invoked under Title 28, United States Code, §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment of the United States Constitution states as follows:

> "AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution, Section One, states as follows:

"AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 22nd, 1977, Robert Melli was found guilty, after a trial by jury, of burglary in the third degree and possession of burglar's tools. The indictment charged petitioner with breaking into an office building at 790 Madison Avenue in Manhattan on April 3rd, 1976, with the intent to steal from a jewelry store located in the building.

At trial, two building employees identified petitioner as the perpetrator of the offense. Both eyewitnesses testified that the assailant had escaped following a struggle with one of them. Subsequently, however, each employee selected petitioner from separate line-ups conducted after his arrest on an unrelated charge. The People also introduced a variety of physical evidence recovered from the scene, as well as an oral statement made following petitioner's arrest.

Petitioner presented an alibi defense although he did not testify in his own behalf. Five other witnesses testified that on the evening in question, they and petitioner Melli were attending a celebration of the upcoming bar mitzvah of his nephew.

At the conclusion of the trial, the court asked defense counsel whether he desired an instruction that the jury should draw no adverse inference from petitioner's failure to take the stand. Defense counsel replied that he did and the court agreed to so charge. No such instruction, however, was ultimately given.

REASONS FOR GRANTING THE WRIT

THE CORRECTNESS OF THE DECISION BELOW IS OPEN TO SERIOUS QUESTION

In the case at bar, in accordance with CPL §300.10(2),* defense counsel, in response to the trial court's inquiry, specifically requested that the court instruct the jury that "the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn . . . . " Such an instruction was especially crucial herein because five other witnesses testified regarding petitioner's alibi defense. Under such

* CPL §300.10(2) provides in pertinent part as follows:
"In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a fact from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation."

circumstances, juror speculation upon petitioner's failure to testify in his own behalf was virtually inevitable.

Once requested, according to the literal language of §300.10(2), the "no inference" instruction is mandatory. Yet, in the case at bar, the court wholly failed to give the instruction. Neither counsel for the defense nor counsel for the state brought the omission to the court's attention. The error went uncorrected.

Petitioner respectfully asserts that the trial court committed plain error which seriously affected the fairness of the trial and deprived him of due process of law. *United States v. Atkinson,* 297 U.S. 157 (1936). This Court is urged to consider the instant case in the light of its holding in *Lakeside v. Oregon,* 435 U.S. 333 (1978).

In *Lakeside,* this Court held that the giving of the "no inference" instruction by a state trial judge, over the defendant's objection, did not violate the Fifth or Fourteenth Amendments. In petitioner's case, the converse occurred. Defense counsel, pursuant to statute, specifically requested the "no inference" instruction which the court thereupon failed to include in its charge. The reasoning of this Court in *Lakeside* implicitly recognizes the salutary impact of the "no inference" instruction. By serving to remove any influence of unspoken adverse inferences from the jury's deliberations, it safeguards a criminal defendant's Fifth Amendment privilege. Its inclusion by the court, over objection, is, therefore, a wholly different matter from its omission. The latter, it is respectfully submitted, is highly prejudicial and an error of constitutional dimension. In short, the correctness of the holding below has far-reaching implications and requires an authoritative response by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

RONALD P. FISCHETTI
Counsel for Petitioner

ANNE C. FEIGUS
Of Counsel

September 19, 1980

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 5, 1980

Present:

Hon. David Ross, Justice Presiding
Hon. Vincent A. Lupiano,
Hon. Samuel J. Silverman,
Hon. Max Bloom,
Hon. Paul J. Yesawich, Jr., Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ROBERT MELLI,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Myers, J.), rendered on April 20, 1977, convicting defendant of burglary in the third degree and possession of burglar's tools, and said appeal having been argued by Anne C. Feigus, of counsel for the appellant, and by Mr. James Rouen of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL §460.50(5).

ENTER:

JOSEPH J. LUCCHI
Clerk

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

ROBERT MELLI

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
June 20, 1980

s/Sol Wachtler
Associate Judge

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* Description of Order: Judgment of Supreme Court, New York County, April 20, 1977 affirmed and remitted to Supreme Court, New York County, for further proceedings by Appellate Division, First Department, June 5, 1980.

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

ROBERT MELLI

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application for reconsideration timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon reconsideration the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
July 25, 1980

s/Sol Wachtler
Associate Judge

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* Description of Order: Judgment of Supreme Court, Bronx, April 3, 1978; affirmed by Appellate Division, First Department, January 29, 1980.

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On Petition for Writ of Certiorari to the New York State Supreme Court, Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 553-9000

MEREDITH ANNE FEINMAN
Assistant District Attorney

JAMES ROUEN
Special Assistant District Attorney

Of Counsel

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On Petition for Writ of Certiorari to the New York State Supreme Court, Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioner Robert Melli was convicted after trial on April 10, 1977 in Supreme Court, New York County (Myers, J.) of Burglary in the Third Degree and Possession of Burglar's Tools (New York Penal Law §§140.20, 140.35). His conviction was unanimously affirmed, without opinion, by the Supreme Court of the State of New York, Appellate Division, First Department, on June 5, 1980. On

June 20, 1980, the New York State Court of Appeals denied Petitioner's motion for leave to appeal. Petitioner was sentenced to a prison term of two and one-third to seven years on the burglary charge and one year on the possession of burglar's tools charge, the sentences to run concurrently.

Petitioner seeks a writ of certiorari to review the order of the New York State Supreme Court, Appellate Division, First Department.*

Statement of the Case

On April 3, 1976, Petitioner broke into an office building in the City of New York intending to steal property from a jewelry store in that building. In the midst of the burglary, Petitioner was discovered by two building employees, who scuffled with Petitioner before he broke away and escaped. Immediately thereafter, the employees described Petitioner to police at the scene, and one of them selected a photo of Petitioner from a book of "mug shots". Petitioner was arrested the following week and was identified in separate lineups by both employees.

At trial, the judge asked defense counsel if he wanted the jury to be instructed that no inference could be drawn from Petitioner's failure to testify on his own behalf. Defense counsel assented. However, apparently through inadvertence, the charge was never delivered. Following the court's charge to the jury, the judge asked defense

* Petitioner has mistakenly cast his petition in the form of a request for review of the judgment of the New York Court of Appeals. The highest state court in which a decision could be had in this case was the Supreme Court, Appellate Division, First Department, as the Court of Appeals denied leave to appeal. See 28 U.S.C. §1257.

counsel three times whether he had any objections or additional requests to charge. Although defense counsel did make some requests for charges, he neither renewed his request for a "no-inference" charge nor objected to the court's failure to give that charge. To the contrary, counsel advised the court that he was satisfied with the charge as modified.

On appeal to the Supreme Court of the State of New York, Appellate Division, First Department, Petitioner argued, *inter alia,* that he had a statutory and constitutional right to receive the "no-inference" charge. That court rejected Petitioner's claims and unanimously affirmed his conviction without opinion. Leave to appeal to the Court of Appeals was subsequently denied by Associate Judge Sol Wachtler on June 20, 1980.

ARGUMENT

Certiorari should not be granted to review the correctness of the decision of the New York Supreme Court, Appellate Division, First Department, since no constitutional question or question of federal law is presented.

This Court should not grant certiorari to review the decision below because (i) Petitioner has shown no conflict between state and federal law or between the decision below and applicable decisions of this Court; and (ii) Petitioner's constitutional claim is without merit.

Petitioner argues here, and argued unsuccessfully on his appeal below, that the trial court's failure to instruct the jury that no inference could be drawn from his failure

to testify was an error of constitutional dimensions. However, this Court has never held that such an instruction is constitutionally required.

Indeed, this Court has recently held that a trial court's refusal to give a requested charge on the presumption of innocence does not constitute automatic constitutional error. *Kentucky* v. *Whorton,* 441 U.S. 786 (1979). It would be anomalous, to say the least, to hold that the "no-inference" charge is constitutionally compelled upon request when the "presumption of innocence" charge is not so compelled. This Court has expressed a reluctance to impose invariable constitutional requirements that specific instructions be given in the state trial courts. *Kentucky* v. *Whorton, supra,* at 789. This Court should not depart from that practice here.

In addition, this Court lacks jurisdiction to review a state court judgment unless that judgment rests upon a federal ground. Indeed, where it appears that a state court judgment may have rested upon independent state grounds, this Court will not take jurisdiction to review the judgment. *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952). The judgment which is sought to be reviewed herein may have rested upon such grounds.* New York's Criminal Procedure Law governs the time and manner of presenting an objection or request in connection with a jury instruction: it must be presented at a time when the judge can still take the desired action. Crim. Proc. L. §470.05. Yet Petitioner's attorney below, an experienced criminal trial attorney, failed to comply with the statute. To be sure, he

* The Appellate Division affirmed and the Court of Appeals denied leave to appeal without written decisions.

did assent to the trial judge's question about the "no-inference" charge prior to summation. However, when that charge was not given, counsel did not point out the non-inclusion of the charge despite having been asked three times by the trial judge whether he had any objections or further requests to charge. Thus, respondent argued below that under New York State law, Petitioner had either abandoned his request or was precluded by law from raising on appeal the absence of a no-inference charge. Crim. Proc. L. §470.05.

However, it should not be assumed that the state courts' review was limited to the question of forms and procedure. In addition to its review of possible errors of law, New York's Appellate Divisions have jurisdiction to review "in the interests of justice" those errors which are not properly preserved. Despite this broad grant of jurisdiction, the Appellate Division found no grounds on which to reverse the judgment herein. Similarly, the Court of Appeals may find an error which was not properly preserved to be reviewable if the error affects the "essential validity of the proceedings", *People* v. *Patterson,* 39 N.Y.2d 288, 296 (1976). That neither the intermediate appellate court nor the reviewing judge of the Court of Appeals saw fit to disturb the trial court's judgment strongly supports the conclusion that that judgment was both fair to Petitioner and correct as a matter of law.

In consequence of all of the above, Petitioner has raised no issue reviewable by certiorari.

Conclusion

The petition for a writ of certiorari should be denied for the above reasons.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

MEREDITH ANNE FEINMAN
Assistant District Attorney

JAMES ROUEN
Special Assistant District Attorney

Of Counsel

November, 1980